Supreme Court, U.S.
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No. 00-479

In The

Supreme Court of the United States

JOHN MENDENHALL,

Petitioner,

versus

THEODORE RISER, JR., individually and in his official capacity as Sheriff of Webster Parish; STEVE CROPPER, JAMES BELL, ALVA NULL, and WAYNE NEWTON, individually and in their capacities as Webster Parish Deputy Sheriffs,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

A homicide had occurred. Right before it happened, the victim was being chased by a group that included several suspected drug dealers. It looked like an execution-style killing. The crime scene and evidence were distorted. The murder weapon was gone. John Mendenhall tampered with the evidence and contaminated the crime scene. Witnesses identified Mendenhall as the shooter. Empty 9mm shell casings were found. Mendenhall had a 9mm gun that he refused to produce. No other suspects had been named. Mendenhall was evasive. Mendenhall was given the opportunity to clarify matters. He admitted that he had the missing evidence; but he refused to produce it or cooperate in any meaningful way.

1. Whether the Fifth Circuit Court of Appeals correctly found that a reasonable officer could have believed there was probable cause to arrest John Mendenhall, in light of clearly established law and the information possessed by the arresting officers, and thus, the arresting officers were entitled to qualified immunity.

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STATEMENT OF THE CASE

On Friday, September 13, 1996, the Webster Parish Sheriff's Office received a report of a double shooting in Cullen, Louisiana. Sometime before 7:30 a.m., one man was kidnapped, shot, and hospitalized. In a second shooting, just a few blocks away from the first, another man was shot in the back and killed. Webster Parish deputies were immediately dispatched from the Sheriff's main office in Minden, Louisiana, to Cullen.

When deputies first arrived at the scene of the second shooting, they found the dead body of William Myles in the middle of the street. Myles was lying on his back, face up, with a large pool of blood around his head and upper back. There were two guns (a .357 revolver and .25 caliber pistol) and a black ski mask on the ground near his feet. (Record 248, Exhibit 3 (herein "Rec" and "Exh")).

A large crowd of local townspeople had gathered and were obviously frightened and disturbed. Two men had just been shot in their neighborhood in broad daylight. The people were scared and were reluctant to talk to investigators or to get involved. However, two witnesses did tell a deputy that John Mendenhall shot the dead man. (Rec 248, Exh 6, pp. 36, 37, 38, 44, 45).

As the investigation developed, the body was turned over and deputies discovered that William Myles had been shot one time, right in the back of the head. Deputies determined that Myles probably had a pistol at the time of the shooting, but it (a .357 revolver) was empty with no live ammunition. They found out that Myles was probably a gang member from out of town who was involved somehow in a bad drug deal or possibly the

other shooting. They learned that Myles was trying to run away from a group of people chasing him when he was shot in the back. The group pursuing Myles included several suspected drug dealers. (Rec 248, Exh 6, pp. 53, 54).

When Myles was shot, John Mendenhall was on the scene. Mendenhall was one of the group that was chasing Myles just before he was shot. "At the moment" Myles was shot, Mendenhall had a gun "in his hand." (Rec 6).

As Myles, who was on foot, attempted to get away from those in vehicles who were chasing him, he turned around and ran toward his pursuers, and ran right by John Mendenhall's truck. Mendenhall yelled at him to "stop" and "frantically" grabbed a 9mm automatic pistol. Within seconds of running away from Mendenhall, Myles was shot in the back of the head. "At the moment that Myles was shot and killed," Mendenhall had the 9mm automatic "pistol in his hand." Immediately after Myles was shot, Mendenhall, who had been standing by his truck, was standing over Myles' dead body with the 9mm pistol in his hand. (Rec 5, 6, 160, Exh 7).

Mendenhall then tampered with evidence on the crime scene. Before any deputies arrived, Mendenhall picked up the victim's gun (a .357 revolver).[1] He took all the shells out of the gun. Apparently finding no live bullets, Mendenhall then re-chambered six empty shell

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[1] Since Mendenhall left the scene without talking to investigating officers, information about whose gun was lying near the victim had to be derived from other sources.

casings, thereby destroying any fingerprint evidence on the gun and the spent casings. (Rec 160, Exh 1).

Mendenhall contaminated the crime scene with another gun. After he saw there were no live bullets in the victim's gun, Mendenhall went back to his truck and got a gun that he had obtained earlier that morning. Before deputies arrived, Mendenhall placed this other gun (a .25 caliber automatic pistol) and a black ski mask on the crime scene near the victim. (Rec 160, Exh 2).

Mendenhall demonstrated uncanny knowledge about the fatal gun shot. Before medical personnel could determine the nature and location of the fatal wound(s), Mendenhall knew the precise number of fatal gunshots and the exact location of the wound. Mendenhall knew Myles was killed by a "single" shot to the back of the head. Before authorities arrived, Mendenhall told emergency medical personnel (Wayne Walsh) on the scene that Myles was killed by "a single head shot". At that point in time, the body had not been moved. Myles was lying supine in a pool of blood. Myles was on his back, face up, and the back of his head was not visible. The "single head shot" could not be seen. Whether the point or multiple points of entry were in the head, neck, or back, was not discernible. The body was not moved to reveal the gun shot wound until after Mendenhall left the scene. (Rec 160, Exh 4).

Mendenhall removed the homicide weapon from the crime scene. Mendenhall was the only person (other than the dead man) reported to have a gun on the scene at the time of the shooting. Yet, Mendenhall left the scene and

took his gun with him. He then concealed its whereabouts. When he was found later, he refused to produce the gun. (Rec 160, Exh 3).

Mendenhall fled from the crime scene, without talking to any of the investigating deputies. He simply left. (Rec 160, Exh 5). After Mendenhall told the ambulance personnel about the gunshot wound, but before any deputies arrived, Mendenhall left the crime scene. Shortly before 8:00 a.m., Webster Parish Sheriff deputies arrived on the scene. Right after the deputies appeared, Mendenhall returned to the scene, but then he quickly disappeared and was not seen again. He avoided the chance that he might be questioned and avoided the opportunity to tell the deputies what he knew. (Rec 7, .16).

Witnesses identified Mendenhall as the shooter. Deputy Dewayne Ashley was one of the first deputies to arrive on the scene. Deputy Ashley promptly canvassed the neighborhood to find and question witnesses. Most of the people were scared and refused to cooperate. However, two witnesses did tell Ashley that John Mendenhall shot Myles. These two witnesses, like others, did not want to get involved and refused to give their names. Later in the day, Deputy Ashley was at the local hospital to investigate the first shooting victim (Deon Grisby) who had only been wounded in the other shooting at a different location. While in the hospital hallway, Deputy Ashley overheard a conversation in which a third witness said that John Mendenhall shot Myles. Deputy Ashley reported to the investigating deputies that the three witnesses (albeit specific names unknown) had identified Mendenhall as the shooter. (Rec 160, Exh 6).

An eyewitness's written statement implicated Mendenhall. In a written statement, Pamela Neal identified only two people on the street at the time of the shooting – the man who was shot and John Mendenhall. Neal identified only one vehicle – Mendenhall's red truck. (Rec 160, Exh 7). Neal's statement makes *no* reference whatsoever to anyone other than Mendenhall (and the victim) having a gun and makes *no* reference to any vehicle other than Mendenhall's truck being present.

Officers found 9mm shell casings on the scene, and Mendenhall had a 9mm gun. The Mayor of Cullen told investigators that there was so much gunfire when Myles was shot that it sounded "like World War II broke loose." Asked if the shooting sounded like a six-round revolver, the mayor said no, that about 20 shots were fired. (Rec 160, Exh 12). Deputies searched the shooting scene and surrounding neighborhood exhaustively. Despite the witness's description of such excessive gunfire, only two empty 9mm shell casings were found. When Myles was shot in the back, he was heading south on Lee Street, running away from Mendenhall, who was standing to the north of Myles near the corner of Boucher Extension and Lee Street. The two empty shells were found approximately 84 feet to the north of the victim's body near the corner of Boucher Extension and Lee Street. (Rec 160, Exh 8).

These two empty shells were 9mm casings. The 9mm casings were obviously not fired by the victim's .357 revolver. The only other gun reported on the scene at the time of the shooting was Mendenhall's gun. Investigators had information that Mendenhall had a 9mm automatic handgun. The deputies then confirmed that information

by questioning a person (Todd Moore) who had worked on Mendenhall's guns. (Rec 160, Exh 9). Mendenhall's gun was also capable of firing in rapid succession, such that it might sound "like World War II broke loose."

Despite his unique knowledge, Mendenhall concealed his information. During the investigation, it became apparent that if Mendenhall did not actually shoot Myles, then he certainly knew who did. (Rec 160, Exh 10). It was also obvious that Mendenhall either had the murder weapon or he knew where it was. Mendenhall was the only person named as being on the scene with a gun in his hand at the time of the shooting. At the very start of the investigation, two witnesses identified Mendenhall as the shooter. Mendenhall's conduct and the information gathered during the rest of the day corroborated the initial information that pointed toward Mendenhall. (Rec 160, Exh 11). Later that afternoon, deputies sought out Mendenhall to get his version of what happened. But, when he was found, Mendenhall concealed the location of the murder weapon and refused to identify the person who shot William Myles. (Rec 160, Exh 5).

Mendenhall concealed and refused to produce vital evidence. During the day, Mendenhall had numerous opportunities to simply tell deputies what had happened. He had at least four (4) different encounters with investigating officers. Each time, however, Mendenhall concealed critical information and refused to produce the evidence that he had within his control.

First, Mendenhall was evasive and suspicious right after the shooting, when he left the scene. He saw investigating officers securing the area and questioning witnesses. But, rather than provide any information at all to the officers, Mendenhall fled the scene "after a few minutes."

Next Mendenhall concealed and refused to provide information later in the day, when Deputy Newton found Mendenhall at his house. Newton asked Mendenhall "what had happened that morning." Mendenhall admitted to being on the scene with a gun, but would not tell Newton who did the shooting or where the murder weapon could be found. Newton told Mendenhall he needed to come to the police station and "get this mess cleared up" and "to bring all the guns he had with him." (Rec 160, Exh 5; Rec 248, Exh 4, p. 157-159, Exh 5, written statement and p. 36).

Then, Mendenhall refused to answer relevant questions and refused to produce evidence in his possession when he met Deputy Cropper at the Springhill Police Department. After some discussion, Mendenhall confirmed he had a 9mm, but would not let deputies see it. He refused to provide information about the shooter or the murder weapon. (Rec 160, Exh 5; Rec 248, Exh 4, p. 161-167).

Finally, Mendenhall admitted to having "all the evidence," but refused to produce it. After meeting with Deputy Cropper, Mendenhall sought out Deputy Alva Null and talked to him. Deputy Null was Mendenhall's life-long "good friend," and "Someone [he] figured [he] could talk to." However, Mendenhall refused to tell Null

about who shot Myles or where the murder weapon could be located. Instead, Mendenhall told Deputy Null to just "wait" till the next week. Mendenhall said he would then "straighten out all this" and bring them "everything." (Rec 160, Exh 5, p. 196; Rec 248, Exh 4, p. 167-172, 196-197; Rec 7, 8). Mendenhall was not just passively or ambiguously silent, he actively declined to provide information and evidence that he was admittedly concealing, without giving any justification.

It was the "total package" that led officers to believe that Mendenhall was engaged in criminal activity. It was not just one particular fact standing alone, it was everything together, along with Mendenhall's behavior throughout the day. (Rec 248, Exh 6, p. 57).

After Mendenhall told Deputy Hull that he had all the evidence but that he would not produce it, Detective Cropper called and talked with State District Judge Bruce Bolin. Cropper told Judge Bolin the facts and circumstances of the investigation, and he answered Judge Bolin's questions. After discussing the matter with Judge Bolin, two affidavits were prepared, one for an arrest warrant and one for a search warrant. Both affidavits described what the deputies reasonably believed were the facts and circumstances surrounding the death of William Myles. Cropper presented the two affidavits to Judge Bolin at the same time. Judge Bruce Bolin issued an arrest warrant for John Mendenhall and a search warrant for his residence and vehicles. (Rec 160, Exhs 6, 13, 14, 15, 16, 17).

Later that night, Mendenhall was arrested. After he was released on bond, Mendenhall filed a Motion for an

Expedited Preliminary Examination. In this motion, *for the very first time,* Mendenhall came up with his alibi. He identified Ted Nelams as the shooter. This information was not provided to the investigators, but was instead provided to the court and to the district attorney.

After a thorough review of the record, the Fifth Circuit Court of Appeals found that a reasonable officer could have believed there was probable cause to arrest Mendenhall. Accordingly, the Court of Appeals recognized that the arresting officers were entitled to qualified immunity and ordered that summary judgment be granted in favor of the officers.

REASONS FOR DENYING THE WRIT

Mendenhall's Petition does not present a compelling reason as required under Supreme Court Rule 10 for granting a writ. At best, the Petition argues the misapplication of a properly stated rule of law regarding summary judgments, but even that argument lacks merit.

This case does not address a conflict in the circuit nor present an important question of law that calls for an exercise of this Court's supervisory power. Petitioner does little more than assert erroneous factual findings by the lower court.

The case cited by Petitioner, *Reeves v. Sanderson Plumbing Products,* ___ U.S. ___, 120 S.Ct. 2097 (2000), did not announce a new, nor clarify an old rule of law regarding the review of summary judgments. *Reeves* clarified a

conflict regarding the scope of review required in considering a Rule 50 motion for judgment as a matter of law in a jury trial ("record taken as a whole" versus "limited to evidence favorable to the nonmovant"). *Reeves* merely mentioned the summary judgment scope of review ("record as a whole") as an analogy. *Reeves*, at 2110. Contrary to Petitioner's argument, the Fifth Circuit Court of Appeals properly applied the appropriate summary judgment standard and scope of review in this case now before the Court.

A homicide occurred. William Myles was killed by a single gun shot to the back of the head as he ran away from a group of people chasing him. That group included several suspected drug dealers. At the moment Myles was shot in the back, Mendenhall was behind Myles with an automatic pistol in his hand.

Immediately after the shooting, Mendenhall was seen with the automatic weapon, standing over the dead body. Mendenhall was the only person identified on the scene with a gun, other than the victim. Right after the shooting, Mendenhall tampered with evidence, contaminated the crime scene, and then fled the scene without talking to investigators and without revealing the whereabouts of the gun used to kill Myles.

During the investigation, witnesses reported Mendenhall as the shooter. Other evidence corroborated those reports. Throughout the investigation, Mendenhall (allegedly a police officer himself) refused to provide investigating officers with any meaningful information. When found, Mendenhall admitted to having "all the evidence," but, he refused to produce it. Mendenhall

refused to tell investigating officers about who shot Myles, about what happened to the murder weapon, or about why he distorted the crime scene and then fled.

Under the circumstances, the Fifth Circuit Court of Appeals found that Respondents, Sheriff Ted Riser and Deputies Steve Cropper, James Bell, Alva Null, and Wayne Newton, acted reasonably in arresting John Mendenhall, and were thus entitled to qualified immunity.

Petitioner Mendenhall would have this Court set forth a new and unprecedented approach for determining probable cause. Rather than determine probable cause from the perspective of an officer on the street, Mendenhall would have this Court determine probable cause from the perspective of a prime criminal suspect who is known to be concealing vital information and evidence.

The Fifth Circuit was correct in finding a reasonable officer could have believed there was probable cause to arrest Mendenhall. The Petition for Writ of Certiorari should be denied.

I. THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE APPROPRIATE STANDARD TO DETERMINE A MOTION FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY.

The Fifth Circuit made an exhaustive and cumbersome *de novo* review of the entire record. *Mendenhall v. Riser*, 213 F.3d 226, 230, 236 (5th Cir. 2000) (herein referred to as Opinion or "Op"). The Fifth Circuit gave "the plaintiff the benefit of doubt with regard to any disputed issues of fact" and viewed the facts "in the light

most favorable to Mendenhall." *Id.* 230-231. "Even after drawing all available inferences in Mendenhall's favor" and viewing the single "factual dispute in the light most favorable to Mendenhall," the Fifth Circuit was "compelled by the facts" to "find, as a matter of law, that a reasonable officer in Deputy Cropper's position could believe probable cause existed to arrest Mendenhall." *Id.* at 236.

Mendenhall has not identified any inappropriate application of the longstanding summary judgment standard of review in the analysis made by the Fifth Circuit.

A. The Fifth Circuit logically and correctly "focused on the identity of the shooter." An arresting officer must know who is shooting before he can consider whether the shooter is justified.

Petitioner attempts to fault the Fifth Circuit Court of Appeals because it "focused on the identity of the shooter, rather than whether the shooting was justifiable." (Petition p. 7). Mendenhall would thus have this Court put the proverbial cart before the horse. He would also have this Court determine probable cause from the perspective of a criminal suspect who is known to be concealing evidence, rather than from the perspective of the officer on the street. Mendenhall's argument is illogical and attempts to distort the common sense foundation for determining probable cause.

The issue before the Fifth Circuit was whether a reasonable officer could have believed there was probable cause to arrest Mendenhall in light of the information

possessed by the arresting officers (not in light of the information which Mendenhall was concealing). The Court of Appeals correctly analyzed the existence of probable cause from the arresting officers' point of view. The reasonableness of an officer's actions "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Conner*, 490 U.S. 386, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989)

The threshold issue in determining probable cause is whether a crime has been committed. There was a dead man lying in the street with a single gun shot wound to the back of his head. From the arresting officer's viewpoint, a homicide had been committed.

The next issue is to determine whether there is probable cause to arrest. To arrest, an officer must have facts to support a reasonable belief that a particular person had violated or was violating the law. Thus, an officer must decide "who" likely committed the crime.

Logically, an officer can not determine whether a crime is justified without knowing who committed the crime. "A homicide is justifiable: when committed in self-defense by *one* who reasonably believes that *he* [or another] is in imminent danger. . . . " LSA R.S. 14:20. Before an officer can determine if a homicide is justified, the officer must know *who* is the "*one* who reasonably believes that *he* [or another] is imminent danger."

Even if the issue were framed in the way that Mendenhall proposes, there was still probable cause to arrest Mendenhall. Further, the investigating officers could not determine whether the shooter had a reasonable belief

that he or someone else was in danger because Mendenhall was concealing the identity of the shooter and refusing to provide critical evidence about the shooting. Today, a nagging question remains: If the shooting was justified, why did Mendenhall withhold evidence and refuse to explain what happened? Without the information and evidence that Mendenhall was withholding, there was not a justifiable shooting. At the time of Mendenhall's arrest, the officers did not have the facts indicating justification because Mendenhall was concealing those facts.

On the day of the arrest, Mendenhall was acting like a person who had committed or was committing a crime. How did he know about the single head shot? Why did he tamper with the evidence on the scene? Why did he bring a gun and ski mask onto the scene? Why did he leave the scene? Why did he not come clean with Newton? Why did he refuse to turn over his gun for ballistics testing? Why did he answer some questions, but not others? Why did he want the officers to wait till the next week for the rapidly disappearing evidence? Why did he refuse to explain things?

Based on the totality of the circumstances, a reasonable officer could have believed that John Mendenhall shot William Myles. The Fifth Circuit correctly "focused on the identity of the shooter" rather than on whether there was some possibility the shooting was justified.

B. The Court of Appeals correctly drew rational inferences in Mendenhall's favor from the evidence relied upon by the arresting officers.

Mendenhall argues that the Fifth Circuit did not rely on the appropriate evidence. Mendenhall accuses the Fifth Circuit of ignoring the full summary judgment record and choosing to focus on what Mendenhall characterizes as "sketchy" evidence that was "adverse to Officer Mendenhall." (Petition, pp. 8 & 13).

However, the relevant issues determine what evidence is relevant. In this case the relevant evidence is the information the arresting officers possessed. "The relevant question in this case . . . is the objective . . . question whether a reasonable officer could have believed [Mendenhall's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3040 (1987).

Mendenhall is entitled to "reasonable" inferences that may be drawn from the information relied on by the arresting officers. But, Mendenhall is not entitled to unreasonable or implausible inferences or to any and all inferences that an attorney can dream up. The Fifth Circuit expressly drew "all available inferences in Mendenhall's favor." *Mendenhall v. Riser*, at 236. Mendenhall has not identified any relevant instance in which the Fifth Circuit failed to give the proper deference in Mendenhall's favor.

i). Deputy Ashley's Witnesses.

When officers first arrived on the scene, two witnesses affirmatively identified Mendenhall as the shooter. (Rec 160, Exh 6). The information gathered during the remainder of the day corroborated those witnesses. When Mendenhall was given the opportunity to explain, he refused.

For lack of a better explanation, Mendenhall now argues these "mystery" witnesses simply did not exist. (Petition p. 9). But he offers no evidence whatsoever to support his purely speculative argument.

Whatever it was these witnesses saw and heard, it led them to believe that John Mendenhall shot that man. The Fifth Circuit correctly found these witnesses were lawfully considered as an integral part of the probable cause equation.

The "critical distinction" which Petitioner posits is meaningless. It really does not matter that these witnesses did not see Mendenhall's finger squeezing the trigger at the precise moment the shot was fired. Mendenhall was not convicted based solely on what these witnesses said. For purposes of probable cause, whatever minute detail they did or did not see, these witnesses saw and heard something that made them think they saw Mendenhall shoot the man, and that is what they reported.

There is no evidence that these witnesses did not exist. No evidence disputes the existence of these two witnesses. According to Deputy Ashley, these witnesses identified Mendenhall as the shooter. (Rec 160, Exh 6).

There is no evidence to dispute or discredit Deputy Ashley (who was not made a defendant). Deputy Ashley has never refuted, controverted, contradicted, or "backed off" his report about the two witnesses (and neither has anyone else). As the Fifth Circuit recognized, Deputy Ashley "filed his written report, complete with references to these witnesses, on the day of the incident and testified consistent with this report in his deposition testimony taken months later." *Op.* p. 242, FN 11. Mendenhall may not defeat defendants' properly supported motion for summary judgment "by merely asserting that the jury might" not believe a witness. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

Hearsay, tips, and hastily gathered information may be used by an officer in determining probable cause. *Franks v. Delaware*, 438 U.S. 152, 98 S.Ct. 2674, 2681, 57 L.Ed.2d 667 (1978). Like every other piece of information, these witnesses were not the sole basis for probable cause. The information they provided, the fact that they were there, and the fact that they thought Mendenhall was the shooter, all fit within the overall picture. They were part of the totality. Everything gathered in the investigation corroborated these witnesses.

It is not reasonable nor plausible to infer that this probable cause factor did not exist. The fact that the two witnesses told Deputy Ashley they saw Mendenhall shoot the man is undisputed. There is no evidence to the contrary. The only reasonable inference is that these two witnesses were a piece of the puzzle that could have led a reasonable officer to believe there was probable cause to arrest Mendenhall.

ii). Pamela Neal's Statement.

By declaring that an eyewitness's account "adds nothing to the probable cause calculus," Petitioner exposes his fragmented and selective tunnel vision. (Petition, 9-10). How does the fact that Mendenhall was on the scene with a gun in his hand at the moment of the shooting "add nothing" to a determination that considers the totality of the circumstances? Petitioner's argument defies common sense.

Pamela Neal watched the events unfold from only about sixty feet from the place where Myles was shot. That day she gave investigating officers a written statement. She placed Mendenhall at the scene with a weapon. She made no indication of another person being there with a gun. She did not identify anyone else as being responsible for the shooting. She made no reference to any other person having a weapon. Neal identified only one possible shooter with a gun ("John") and only one vehicle (John Mendenhall's "truck"). "John" was the only person "with a gun in his hand" as Myles "was hitting the ground" at the moment of the shooting. (Rec 160, Exh 7).[2]

Petitioner complains that the Fifth Circuit "refused to draw an obvious inference favorable" to petitioner from Neal's statement. However, even Jimmy White, Mendenhall's half-brother who allegedly sent Mendenhall on

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[2] Petitioner originally claimed that Neal's written statement included everything she told the officers that day about the shooting. (Rec 36). Now, however, Petitioner says it means "nothing."

the mission to get Myles, thought that Mendenhall was the shooter when he came on the scene and saw Mendenhall with the gun. (Rec 303).

In addition to her written statement, Neal gave a deposition in this litigation in which she claimed to have also given oral statements to the officers. The Fifth Circuit carefully reviewed the entire record. It examined each of Neal's written and oral statements in detail. It specifically found that Neal's statements did not create a material fact issue. "The mere existence of *some* alleged factual dispute" is insufficient; the dispute must be over a "*material* fact. . . . Only disputes over facts that might affect the outcome of the suit under the governing law" can be defined as material. *Anderson v. Liberty Lobby*, at 2510.

Under the governing law, Neal's oral statements do not affect the outcome of the qualified immunity issue. The issue is "whether a reasonable officer could have believed probable cause existed to arrest Mendenhall." *Op.* p. 236. "[A]ffording these statements appropriate weight . . . , reading them in conjunction with her handwritten statement which excluded any reference to this other man, and considering the totality of the remaining evidence pointing to Mendenhall as the shooter," a reasonable officer "could still conclude probable cause to arrest existed." *Op.* p. 236.

The Fifth Circuit did not, as Petitioner argues, "disregard" Neal's statements. The Fifth Circuit expressly considered the statements, but unlike Petitioner's fragmented approach, the Fifth Circuit considered the statements in light of the totality of the circumstances. In

that light, any dispute regarding the statements is immaterial.

iii). Mendenhall's Knowledge of the Fatal Wound.

Petitioner complains that the Fifth Circuit went "out of its way to draw an adverse inference" from Mendenhall's statement to medical personnel that Myles was killed by a "single head shot." Like the position he takes regarding Neal's statement, Mendenhall argues that his own statement about the fatal wound means "nothing."

When Mendenhall made the statement, it was *very* unusual. The timing, substance, and precision of the eerie observation were disquieting. The victim's fatal wound "was not immediately evident, as Myles was lying face up in the road. . . . In fact, Wayne Walsh, a trained emergency medical technician, could not determine the nature of the injury until the body was 'rolled.' " *Op.* p. 232, FN 7.

The record clearly establishes that Mendenhall's conduct and knowledge were suspicious. Investigators questioned how Mendenhall could have such knowledge. (Rec 215, Exh D, p. 15-16). Before the Court of Appeals, Mendenhall admitted that the information was "curious." "Curiosity here may have invited questions" about Mendenhall's unexplained knowledge of the exact location and nature of the entry wound which no one could see. (Appellee Brief, pp. 21-22). Mendenhall now admits that deputies knew he was on the scene and in a position to have unique knowledge about the shooting. He obviously knew what occurred. Yet, Mendenhall, who claims he was

acting as a police officer himself, simply left. He refused to cooperate with investigators and would not explain what happened or how he knew or what he knew about the single head shot.

If at any time during the day "Officer" Mendenhall would have just told the deputies what happened, he would not have been arrested (if it happened as he now claims). But Mendenhall did nothing to dispel the mounting evidence, instead, Mendenhall continued to actively conceal critical information and evidence.

iv). Fingering, Distorting and Contaminating Evidence.

Mendenhall again accuses the Fifth Circuit of going "out of its way" to draw an adverse inference by "characterizing his conduct as 'tampering with evidence.' " But Mendenhall's argument is meritless.

Wayne Walsh, who heard Mendenhall's statement about the head shot, also witnessed "Mendenhall pick up a silver revolver that was lying at the feet of the victim, unchamber the rounds of ammunition in the weapon, examine them, replace them in the chamber, and then place the weapon back on the ground. . . . " *Op.* p. 235.

In his deposition, Mendenhall admitted that his conduct was suspect and anything but standard. He likely would have moved the body, but he thought he "was making enough boo-boo's as it is." *Op.* p. 232, FN 8. Mendenhall literally violated LSA R.S. 14:130.1: "Obstruction of Justice" and LSA R.S. 14:134.2: " . . . Tampering with Evidence." Mendenhall intentionally altered, moved, removed, and added objects at the scene which

he knew or had good reason to know would be the subject of an investigation by law enforcement officers.

Mendenhall's argument relies exclusively on Mendenhall's articulation of his own subjective motives as an explanation for distorting the crime scene. His current excuses about his own motives are irrelevant and immaterial. The relevant issue is the information known to the arresting officers at the time of the arrest. Since Mendenhall refused to explain his subjective motives, they were not known to the arresting officers, and are simply irrelevant.

The evidence is undisputed that Mendenhall tampered with evidence. That information alone could have served as the basis for probable cause to arrest. *Op.* p. 243, FN 19. That evidence was correctly factored into the overall probable cause determination along with every other piece of the puzzle the investigators found.

v). Two Spent Nine Millimeter Shell Casings.

Petitioner's argument that the two 9mm shell casings could be exculpatory rather than incriminating is not supported by evidence and is logically and legally flawed.

Petitioner claims that the two shell casings were found "where Pamela Neal had told the deputies the 'green car' shooter" was located. That statement is not correct; there is no evidence to support it. The two spent 9mm shells were found lying only 10 inches apart right next to the *west* edge of Lee Street near the corner of Boucher and Lee where Mendenhall was standing. (Rec

160, Exh 8). The green car which Pam Neal allegedly described was on the *east* side of Lee Street beside a "little sewer tank." (Rec 248, Exh 9). Also, the alleged "green car shooter" was specifically described as firing only *one* shot. This alleged "shooter" was crouched down behind the door between the car and the sewage tank on the *east* side of the green car. The casings were all the way over the car on the west side of the street. Simply because the casings were found somewhere on Lee Street does not change the law that a non-movant is entitled to only reasonable, not fantastic, inferences.

Likewise, as discussed earlier, Pam Neal's references to the "green car shooter" are not material, and thus cannot be used to create a triable issue. Considering the totality of the evidence pointing at Mendenhall, a reasonable officer could have believed the two 9mm shell casings along with the information that Mendenhall had an automatic 9mm weapon added to the probable cause equation.

vi). Mendenhall's Evasiveness and Refusal to Cooperate.

While arguing before the Fifth Circuit, Mendenhall admitted that it was "reasonable . . . [for] investigators to wonder about why the plaintiff left the scene . . . before talking to Investigating Officers" (Appellee Brief, pp. 22, 33), and that his "leaving might perhaps be a curious matter. . . . " (Appellee Brief, p. 35).

Now, however, Mendenhall argues that the Fifth Circuit impermissibly drew the wrong inference when it found that "shortly before investigating officers Cropper

and Null arrived at the scene, Mendenhall simply left, without offering any statement concerning the events of the day. His sudden absence from the scene of a homicide, without any explanation, warranted further inquiry in the minds of lead investigators. . . . It was his voluntary, premature exit from the scene, before he could even be asked about the day's events, that led investigators to first question his role in Myles' shooting death." *Op.* p. 232-33, FN 9. Obviously, consistency is not a means of reaching the end which Mendenhall seeks.

After Mendenhall fled the scene, investigators realized that Mendenhall either did the shooting or knew who did. "In an attempt to obtain Mendenhall's version of events, Deputy Newton paid a visit to Mendenhall, at his residence. In response to inquires as to the day's events, Mendenhall . . . said he chambered a round in his handgun . . . but it jammed. He then refused further comment." *Op.* p. 235.

Later that day, Cropper questioned Mendenhall at the station house "concerning the shooting, beginning with questions as to whether Mendenhall possessed a nine-millimeter weapon. Mendenhall apparently answered those initial questions, but as soon as the interview focused more intently on the morning's events, Mendenhall refused to provide additional information" and got up and left. *Id.*

Afterwards Deputy Null talked to Mendenhall. Again, Mendenhall refused to provide any substantive information, saying only that if the deputies would just wait until Monday, he "would provide them with all relevant evidence concerning the shooting." *Id.*

In Mendenhall's Petition, he tries, as he did below, to ignore the fundamental principles of probable cause. Rather than consider the totality of the circumstances, Mendenhall attempts to isolate details and argues that a particular isolated fact does not establish probable cause. However, there was not just one incident where Mendenhall refused to answer questions; it was his conduct throughout the day. He had several opportunities to explain his conduct, but each time he was evasive and refused to cooperate.

Mendenhall argues that his evasiveness was justified because he thought deputies "ignored him" and he was "piqued." As the Fifth Circuit recognized, "Mendenhall's purported motivation in refusing to answer questions is irrelevant." *Op.* p. 235.

The fact that a suspect refuses to cooperate and answer questions may be used by an officer to find probable cause. *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). Mendenhall's silence was not just passive; it was an active refusal to provide vital evidence. His silence was a continuous, suspicious harboring and concealing of critical information. According to this Court, "Silence in the face of accusation is a relevant fact. . . . Silence is often evidence of the most persuasive character. . . . " *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 1558 (1976). Silence, evasiveness, and a suspect's refusal to answer questions are relevant facts that can be used to establish probable cause. *Hunter v. Bryant*, supra. In the context of qualified immunity, such silence can certainly be considered in determining whether a reasonable officer could have believed there was probable cause. *Id.* 112 S.Ct. 537.

From the arresting officers' perspective, homicide evidence was disappearing and being distorted quicker than they could gather it. The arresting officers knew that Mendenhall, who had a prior felony conviction, was on the scene of a violent homicide with a gun in his hand. (Rec 160, Exh 3, pp. 181-82). Mendenhall had tampered with, destroyed, and removed critical evidence from the crime scene. The local townspeople witnessed what appeared to be an execution-style shooting and were afraid to talk. Mendenhall was intimately involved and knew exactly what happened, and how it happened. Yet, Mendenhall, who was supposedly a police officer himself, refused to cooperate and refused to turn over vital evidence that he had in his possession. From the investigator's perspective, it simply did not make sense for Mendenhall to withhold and conceal information, *if he had clean hands*. Also, considering Mendenhall's conduct throughout the day, any further delay would worsen the exigent circumstance that evidence might be further moved or destroyed. *U.S. v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

Throughout the investigation, the facts pointing toward Mendenhall continued to mount. It was not just one or two isolated facts. It was everything taken as a whole. Mendenhall was given several opportunities to exculpate himself; however, he refused. Instead, he evaded officers, concealed vital information, withheld evidence, and incriminated himself further.

II. THE COURT OF APPEALS CORRECTLY CONSIDERED MENDENHALL'S "SILENCE" AS GROUNDS FOR PROBABLE CAUSE.

Petitioner's argument regarding post-*Miranda* silence lacks merit for the same reasons just discussed in the section above captioned "vi). Mendenhall's Evasiveness and Refusal to Cooperate." It was not just one instance of withholding or concealing evidence, it was Mendenhall's conduct throughout the entire day that led officers to believe there was probable cause to arrest him.

Petitioner cites the case of *Doyle v. Ohio*, 426 U.S. 610 (1976) for the proposition that a "reasonable officer would know" that the use of post-*Miranda* silence should not be used in determining probable cause. *Doyle* does not stand for such a proposition. Such a bright line rule is not clearly established.

Doyle does not completely exclude the use of post-*Miranda* silence, even at a criminal trial. *Doyle* does not address the use of an alleged police officer's flight from a crime scene and his subsequent evasiveness and refusal to cooperate. *Doyle* does not address an alleged police officer's blatant refusal to turn over evidence of a homicide. Moreover, *Doyle* does not address the use of silence in the probable cause analysis. An isolated and elusive evidentiary ruling has not created a hard and fast rule for the officer on the street grappling with a maze of rapidly developing, convoluted information. There are numerous factors that may lawfully be considered in determining probable cause that are ultimately not admissible at trial. *Doyle* has not changed that law.

Not only is *Doyle* inapposite from a legal point of view, it is also factually irrelevant. Each time that Mendenhall was "silent", he had not just been read his *Miranda* rights. Further, at the station house after he was read his rights, it was not just his "silence," it was also the fact that Mendenhall refused to produce his gun for ballistics testing. Even Mendenhall admits there was probable cause to seize the gun. The fact that "officer" Mendenhall refused to produce evidence which he knew there was probable cause to seize is clearly a permissible factor in the probable cause analysis.

Clearly established law says that silence is a relevant fact which can be used to establish probable cause. *Hunter v. Bryant,* supra; *Baxter v. Palmigiano,* supra. The arresting officers did not violate clearly established law when they considered Mendenhall's evasive conduct throughout the day as indicative of probable cause.

III. THE COURT OF APPEALS PROPERLY FRAMED THE QUALIFIED IMMUNITY INQUIRY.

According to the Fifth Circuit, the "inquiry now before us" is "whether a reasonable officer could have believed probable cause existed to arrest Mendenhall." *Op.* p. 236. This is the exact "formulation" which Mendenhall says the Fifth Circuit "should have" used. Petition, p. 15.

There is no difference in the outcome between formulating the qualified immunity test as (1) whether the facts support a finding that "a reasonable officer could have believed probable cause existed to arrest Mendenhall" or (2) "whether the facts . . . support a finding that no

reasonable officer could have believed probable cause existed." It is an objective inquiry using the "reasonable officer" (akin to the "reasonable man") standard. If a reasonable officer could have believed there was probable cause, then there is qualified immunity. If no reasonable officer could have believed there was probable cause, then there is no qualified immunity.

So, what is the problem? Petitioner is arguing with the law. He does not like qualified immunity, and so he simply declares that it is wrong. He offers no alternative. The test for qualified immunity is well established. Petitioner's attempt to semantically dissect and confuse the law has no legal, logical, nor grammatical foundation.

The case cited by Petitioner, *Williams v. Taylor*, ___ U.S. ___, 120 S.Ct. 1495 (2000), does not change the law of qualified immunity. The case mentions the words "qualified immunity," only in passing, and then only to say it was not relevant to the case. Contrary to Petitioner's argument, *Williams*, a case dealing with the law of habeas corpus, did not modify or affect the "doctrinally distinct law of qualified immunity." *Id.* 1506, FN 12. Likewise, Petitioner's criticism of *Babb v. Dorman*, 33 F.3d 472 (5th Cir. 1994) is unfounded. *Babb*'s analysis has never been reversed or criticized by any authority. Petitioner's argument is no more than argument for the sake of argument.

CONCLUSION

Based on the totality of the facts and circumstances, a reasonable officer could have believed that it was lawful to arrest Mendenhall.

Mendenhall is not an innocent "victim of police misconduct . . . most deserving of a remedy – the person who in fact has done no wrong, and has been arrested for no reason." *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271 (1986). Mendenhall was a police officer who tampered with evidence. He distorted and contaminated the crime scene. He put a throw-down gun on the scene and then disappeared. He knew who did the shooting, and he knew the location of the murder weapon. Yet he purposely chose to conceal all this information. Mendenhall claims he was entitled to some special treatment because he was a police officer. However, as a police officer, Mendenhall's conduct was "plainly incompetent." He was trained to enforce the law, yet, Mendenhall "knowingly violated the law." Now, he seeks to benefit from his own criminal behavior. He is asking this Court's blessings, and he should be denied.

Respectfully submitted,

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